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March 15, 2006

**VIA ELECTRONIC AND FIRST-CLASS MAIL SERVICE**

The Honorable Charles L.A. Terreni  
Chief Clerk  
**South Carolina Public Service Commission**  
PO Drawer 11649  
Columbia SC 29211

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2006 MAR 15 PM 4:35  
SC PUBLIC SERVICE COMMISSION

RE: Application of Total Environmental Solutions, Inc. for Rate Relief  
**Docket No. 2004-90-W/S, ELS File No. 557-10022**

Dear Charlie:

Enclosed for filing please find and original and ten copies of the **Brief of Total Environmental Solutions, Inc. and Proposed Order of Total Environmental Solutions, Inc.** for filing in the above-referenced docket. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please stamp "received" the additional copy of this letter, and return with the bearer of these documents.

With kind regards, I am

Yours truly,

  
John F. Beach

JB/cr

cc: Mr. Paul Maeder [via electronic and first-class mail service]  
Mr. Gary Shambaugh [via electronic and first-class mail service]  
Mr. Bill Schoening [via electronic and first-class mail service]  
All parties of record [via electronic and first-class mail service]

**STATE OF SOUTH CAROLINA  
BEFORE THE PUBLIC SERVICE COMMISSION  
DOCKET NO. 2004-90-W/S**

IN THE MATTER OF: )

Total Environmental Solutions, Inc. )  
Application for Increase in Rates and )  
Charges for Water and Sewer Services )

**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day, one (1) copy of the **Brief of Total Environmental Solutions, Inc. and Proposed Order of Total Environmental Solutions, Inc.** via electronic mail and by placing a copy of same in the care and custody of the United States Postal Service, with proper first-class postage affixed hereto and addressed as follows:

H. Asby Fulmer, III  
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**Office of Regulatory Staff**  
Legal Department  
PO Box 11263  
Columbia SC 29211

  
Carol Roof

Columbia, South Carolina  
March 15, 2006

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**STATE OF SOUTH CAROLINA  
BEFORE THE PUBLIC SERVICE COMMISSION  
DOCKET NO. 2004-90-W/S**

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2005 MAR 15 PM 4:35  
SC PUBLIC SERVICE  
COMMISSION

IN THE MATTER OF:	)	
	)	
Total Environmental Solutions, Inc.	)	<b>SECOND ORDER.</b>
Application for Increase in Rates and	)	<b>ON REMAND</b>
Charges for Water and Sewer Services	)	
_____	)	

This matter is before the Commission on remand, pursuant to Judge James R. Barber, III's October 25, 2005 Amended Order Ruling on Appeal of Public Service Commission Decisions. The Commission issues this Second Order on Remand after reviewing the briefs and proposed orders of Total Environmental Solutions, Inc. (TESI), the Foxwood Hills Property Owners Association ("POA") and the South Carolina Office of Regulatory Staff ("ORS").

**I. Procedural History**

This matter is part of the rate case that TESI originally filed in March, 2004. In September, 2004 the Commission issued an order granting TESI's request for a rate increase. *Order No. 2004-434 ("Main Order")*. When the Commission applied the rates TESI had requested to the Commission Staff's<sup>1</sup> as-adjusted test year operating expenses, the requested rates would have resulted in an operating margin of 28.68%. We found that this 28.68% operating margin was excessive and, instead, ruled:

an ultimate fair operating margin that the company should have an opportunity to earn is 20.00%.

*Main Order*, p. 5.

The Commission determined that the necessary annual revenues resulting from the fair and reasonable operating margin would be \$609,624. After viewing all the evidence in this proceeding, the Commission expressly found that the 20% operating margin and corresponding annual revenues were ultimately "fair" *Main Order*, pp.5, 29, 34; "appropriate" *Id.*, pp. 34,

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<sup>1</sup> Since the Commission's hearing in this proceeding, 2004 Act No. 175 went into effect. Among other things, that Act created the Office of Regulatory Staff ("ORS") and transferred the role of the Commission Staff with regard to accounting testimony in utility rate proceedings to the ORS.

35; “required” *Id.*, pp. 5, 30, 34, 35; needed for TESI to be “viable” *Id.*, p. 29; “reasonable and fair” *Id.*, p. 30; “fair and reasonable” *Id.*, p. 34; “reasonable” *Id.*, p. 34; and “just and reasonable” *Id.*, p. 35. The Commission determined to soften the impact of this increase on Foxwood customers by phasing in TESI’s ultimate revenues and operating margin over 24 months. *Id.*, p. 5. Pursuant to this finding, TESI would not begin to earn its necessary annual revenues and operating margin until September 17, 2006.

TESI petitioned for reconsideration on a number of issues, including TESI’s contention that it was inappropriate for the Commission to phase the required revenues and operating margin in over a 24-month period. The POA also petitioned for reconsideration, solely contesting how the Commission allowed the utility to charge a customer who disconnects and then reconnects service within ten months.

The POA did not contest the Commission’s conclusions regarding TESI’s fair operating margin or required annual revenues. The POA also did not contest the Commission’s determination that TESI was entitled to begin earning this 20% operating margin and associated annual revenues on September 17, 2006.

The Commission denied the parties’ Petitions for Reconsideration, except for TESI’s request that the Commission change its accounting treatment of enhancement fee revenue.

On January 14, 2005, the Commission issued *Order No. 2004-574*. (“*Order on Reconsideration*”) In that Order the Commission reaffirmed all findings and conclusions of the *Main Order*, which included all of its conclusions regarding the 20% operating margin and corresponding annual revenues. *Order on Reconsideration*, p. 8. The Commission recalculated the rates based on the new accounting treatment for enhancement fees, and increased TESI’s ultimate annual revenue requirement from \$609,624 to \$621,424. *Id.*, p. 7. The Commission restated the implementation schedule so that TESI would have the opportunity to begin earning its operating margin and required annual revenue on December 1, 2006.

TESI appealed the Commission’s Orders on several grounds, including that the Commission made an error in phasing in TESI’s “fair and reasonable” rates over a 24-month period. TESI specifically requested that an appellate court require the Commission to immediately implement the 20% operating margin and \$621,424 annual revenues as reflected by the Phase 3 rates. The POA did not appeal any aspect of the Commission’s orders.

TESI did not place higher rates into effect under bond pending this appeal, and continued to operate under the Commission's Phase 1 rates.

On September 27, 2005, the Circuit Court granted TESI's appeal on the ground that the Commission erred in phasing TESI's ultimate rate increase in over a 24-month period. The Circuit Court denied the remaining grounds for appeal. The Court remanded the case for the Commission to provide TESI with its fair and reasonable rates in a single, non-phased manner. The Court rejected TESI's request that it expressly require the Commission to immediately place the exact Phase 3 rates into effect.

TESI filed a Motion to Alter or Amend Judgment requesting that the Court clarify whether it was reviewing and reversing our primary findings on fair and reasonable operating margin, and required annual revenue. The Circuit Court granted TESI's Motion, and amended its remand Order by adding the following clarifying language: "This court makes no finding as to what an appropriate operating margin should be." *Amended Order*, p. 9.

## **II. Discussion and Holdings**

### **A. The Law of the Case doctrine bars any change of the Commission's previous findings and conclusions on TESI's fair and reasonable operating margin and required annual revenue.**

We hold that the Commission must, as a matter of law, now approve rates that provide TESI the opportunity to earn its 20% operating margin and \$621,424 annual revenues. The POA did not challenge the Commission's initial findings and conclusions on these issues through either a motion for reconsideration or an appeal. These Commission findings and conclusion were therefore not before the Circuit Court for review on appeal, and are not now before the Commission on remand.

The recent case of *Brunson v. American Koyo Bearings*, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005) ("*Brunson*") is dispositive. In that case, a single Commissioner for the South Carolina Worker's Compensation Commission made several determinations on a claim, including that Claimant's contact dermatitis was a compensable work-related injury. Employer appealed several of the Commissioner's findings to the full Commission, but did not appeal the compensability of the contact dermatitis. The full Commission reversed the single

Commissioner and issued an order generally remanding the case for a *de novo* hearing. The Claimant filed an interlocutory appeal contending, among other things, that the remand for *de novo* hearing improperly reopened *all* issues to be relitigated, including the issue of compensability of the contact dermatitis, which had never been appealed.

The Court of Appeals ruled that the full Commission's authority on appeal was restricted, "by operation of law," to only those issues that were expressly appealed, and that the single Commissioner's authority on remand was similarly restricted. *Id.*, 367 S.C. 161, 623 S.E.2d 870, 872. The Court held that since no party had appealed the initial finding that the contact dermatitis was compensable, that finding was the "law of the case," and could not either be altered by the full Commission on appeal, or relitigated before the single Commissioner on remand. *Id.*

We find that the present case is materially identical to *Brunson* on the issue at hand. In the TESI rate proceeding, no party appealed the Commission's primary findings regarding the operating margin that was fair and reasonable or the annual revenues that were required for TESI's operations. These findings were therefore, by operation of law, neither before the Circuit Court on appeal, nor now before the Commission on remand. *Brunson* holds, therefore, that, *regardless of the Circuit Court's ruling*, the Commission's primary findings and conclusions are the law of the case, and cannot now be relitigated by the parties or altered by the Commission.

The Circuit Court's decision to grant TESI's Motion to Alter or Amend Judgment, and to add the clarifying language contained in the *Amended Order*, makes it clear that the Court did not intend to reverse the Commission's findings on operating margin or required annual revenue. The Circuit Court invited reference to the transcript of the hearing if any party had a question regarding why the Court added the sentence stating that it was making no finding with respect to operating margin. *Transcript of October 24, 2005 Circuit Court Hearing*, p. 12. The following interchange at that hearing makes the meaning of the Court's amendment completely clear:

MR. BEACH: . . . I think what Mr. Ellerbee [sic] will argue is that you have reverse[d] the commission's finding on 20 percent and you left it open to the commission.

THE COURT: If he does that he would be one, in error and two, intellectually dishonest to do that. I mean, I just said and Mr.

Ellerbee [sic] agrees I made no finding with respect to the operating margin.

*Id.*, p. 9, ll. 16 – 24.

Clearly, the Circuit Court did not reverse our primary findings regarding fair operating margin or required annual revenue, and leave those issues open for our review on remand. It is therefore certain that the Circuit Court's order does not reverse these Commission rulings. Even if the Circuit Court had attempted to reverse these rulings, *Brunson* holds that the Circuit Court, by operation of law, would have had no authority to do so.

For these reasons, the Commission finds and concludes that TESI may now implement fair and reasonable rates that provide it with the opportunity to earn a 20% operating margin, and \$621,424 annual revenues. Since the Phase 3 rates previously set forth in our *Order on Reconsideration* accomplish this requirement, we hereby rule that TESI may implement those Phase 3 rates immediately.

**B. The evidence in this proceeding does not support a change in the operating margin and annual revenue requirement that the Commission has twice found to be fair and reasonable.**

Even if the law of the case did not require the Commission to implement rates allowing TESI the opportunity to earn a 20% operating margin, and \$621,424 annual revenue, the Commission must still adhere to the same operating margin that we has already twice found in this case to be fair and reasonable. This panel made these findings and conclusions after carefully assessing all of the evidence in this proceeding. Here on remand, when we review the exact same evidence that led us to those conclusions in September 2004 and January 2005, we must again reach the same conclusions. These conclusions were in the public interest immediately following the 2004 rate proceeding, and they continue to be so now.

The remand of this case is on the existing record, and without further evidentiary hearings. The evidence that led us to our findings regarding operating margin and required annual revenues in the initial proceeding is identical now, and has not changed. Any decision on remand must be supported by record evidence. See, *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (S.Ct., 1992) ("*Hamm*") ("The

Commission must set forth findings which are sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings [citing *Able Communications v. South Carolina Public Service Commission*, 290 S.C. 409, 351 S.E.2d 151 (1986)].)

It is also true that, in order to change our previous rulings on operating margin and required annual revenue, the record must contain evidence not only supporting a different operating margin and required annual revenue, but also a *decision to change our prior ruling*. The record is void of any evidence that would support a decision to now *change* operating margin and required annual revenues.

All of this is consistent with the preceding discussion on “law of the case.” In *Nelson v. Charleston and Western Carolina Railway Company*, 231 S.C. 351, 98 S.E.2d 798 (1957), the court noted:

Of course, the doctrine of “the law of the case” has no application where the facts relating to the question decided are substantially different on a second appeal. *In order to escape the application of the doctrine, however, there must be a material change in the evidence.* [emphasis added]

This holding in *Nelson* applies with equal force here, where there clearly has been no material change (or any change, for that matter) in evidence. Thus, the single rate required by the Circuit Court on remand must be based upon the Commission’s findings of 20% operating margin and \$621,424 required annual revenue. As set forth above, we now rule that TESI may implement the Phase 3 rates to accomplish this.

**C. The Foxwood Hills customers have now received substantially all of the monetary benefit that the Commission sought to bestow upon them through the phased rates.**

By the time TESI is able to begin earning Phase 3 rates under the current remand, the customers will have received essentially all of the monetary benefit that the Commission intended to provide to them from the phased rates. Put another way, if the Commission’s decision meant TESI is entitled to earn 20%, but only *after* giving customers the monetary benefit of the lower Phase 1 and 2 rates, *that is essentially where we are today*.

Even though the Commission *Orders* allowed TESI to shift to Phase 2 on December 1, 2005, the circuit court made that impossible by remanding this case to the Commission just before that rate increase was to occur. Because of the Court's remand, TESI was unable to increase its rates to Phase 2 on December 1. Consequently, TESI is still today charging Foxwood customers under Phase 1 rates.

Based upon the phased-in rate schedule, TESI would have had the opportunity to earn \$981,754 during the 26 months between the implementation of Phase 1 under the Commission's first order and the December 1, 2006 implementation of Phase 3. (See, **Exhibit 1**, attached, p. 1) If the Commission had immediately implemented TESI's ultimate Phase 3 rates, TESI would have earned \$1,344,444 during that same period. Thus, by phasing TESI's rates in over 26 months, we intended to dampen the effects of this necessary rate increase by saving Foxwood customers \$362,690.

If, following the Commission's order on remand, TESI is able to implement its Phase 3 rates on May 1, 2006, then TESI will have earned \$999,954 between issuance of the *Main Order* and December 1, 2006. (**Exhibit 1**, p. 2). Under this scenario, the Foxwood customers will receive \$344,490 of the original \$362,690 savings (all but \$18,200). Thus, a May 1, 2006 implementation of the 20% operating margin will give Foxwood customers more than 95% of the total benefit this Commission intended to provide to them through the phased rates.

If TESI is not able to implement its 20% rates until June 1, 2006, Foxwood customers will have saved the exact same amount, \$362,690, the Commission intended for them to save under the phased rates. (*Id.*)

This analysis is relevant to the Commission's previous rulings on fair and reasonable operating margin and required annual revenues. In our *Main Order*, we ruled that:

an ultimate fair operating margin that the company should have an opportunity to earn is 20.00%.

*Main Order*, p. 5.

Similarly, we also ruled that:

Based upon the adjustments approved herein, and the increase in rates approved herein, the appropriate operating margin for TESI on its South Carolina operations is 20.00%, to be achieved after all three phases occur.

*Main Order*, p. 35.

In so ruling, we intended to provide TESI with the opportunity to earn this operating margin and these required revenues *after* it had charged Foxwood customers under the lower Phase 1 and 2 rates. Since Foxwood customers have now received essentially the same monetary benefit they would have received if TESI had implemented the phase rates as ordered, it would be inequitable, and inconsistent with the record evidence, to now change the ultimate operating margin and annual revenues this Commission has now twice found to be fair, reasonable, and necessary for TESI's South Carolina operations.

IT IS THEREFORE ORDERED THAT:

1. The Commission hereby affirms all of the findings and conclusions of the *Main Order* and the *Order on Reconsideration*, except as modified herein.
2. The schedule of rates and charges attached hereto as Appendix A is hereby approved for service rendered on or after the date of this Order. Further, the schedule is deemed to be filed with the Commission pursuant to S.C. Code Ann. Section 58-5-240 (as amended).
3. Should the schedules approved herein and attached hereto as Appendix A not be placed in effect until three (3) months from the effective date of this Order, the schedules shall not be charged without written permission from the Commission.
4. TESI shall maintain its books and records for water and sewer operations in accordance with the NARUC Uniform System of Accounts for Class B Water and Sewer Utilities, as adopted by this Commission.
5. This order shall remain in full force and effect until further Order of the Commission

BY ORDER OF THE COMMISSION:

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Randy Mitchell, Chairman

## MONETARY BENEFIT TO TESI CUSTOMERS FROM PHASED RATES

### Charges to Customers Under Phased Rates - As Ordered

<i>Ph. 1a</i> October 1, 2004 – November 30, 2004	\$ 33,257/mo x 2 = \$ 66,514
<i>Ph. 1b</i> December 1, 2004 – November 30, 2005	\$ 33,585/mo x 12 = \$ 403,020
<i>Ph. 2b</i> December 1 2005 – November 30, 2006	\$ 42,685/mo x 12 = <u>\$ 512,220</u>
<b>Total</b>	<b>\$ 981,754</b>

### Charges to Customers - In Absence of Phased Rates

<i>Ph. 3a</i> October 1, 2004 – November 30, 2004	\$50,802/mo x 2 = \$ 101,604
<i>Ph. 3b</i> December 1, 2004 – November 30, 2006	\$51,785/mo x 24 = <u>\$1,242,840</u>
	<b>\$1,344,444</b>

### Total Monetary Benefit to Customers from Phase Rates

	\$1,344,444
-	<u>\$ 981,754</u>
	<b>\$ 362,690</b>

*Note: Phase "1a, 2a, and 3a" designates rates from Order No. 2004-434 (Main Rate Order)  
Phase "1b, 2b, and 3b" designates rates from Order No. 2004-574 (Order on Reconsideration)*

# **MONETARY AFFECT ON TESI CUSTOMERS**

## **IMPLEMENTATION OF *PHASE 3b* RATES**

### **Actual Charges to Customers With May 1, 2006 Implementation of Phase 3b**

<i>Ph. 1a</i> October 1, 2004 – November 30, 2004	\$ 33,257/mo x 2 = \$ 66,514
<i>Ph. 1b</i> December 1, 2004 – November 30, 2005	\$ 33,585/mo x 12= \$ 403,020
<i>Ph. 1b</i> December 1, 2005 – April 30, 2006	\$ 33,585/mo x 5 = \$ 167,925
<i>Ph. 3b</i> May 1, 2006 – November 30, 2006	\$ 51,785/mo x 7 = \$ 362,495
<b>Total</b>	<b>\$ 999,954</b>

Charges to Customers, actual	\$ 999,954
Charges to Customers under phased rates, as ordered:	- \$ 981,754
Difference in benefit between Actual and As Ordered:	<b>\$ 18,200</b>

### **Actual Charges to Customers With June 1, 2006 Implementation of Phase 3b**

<i>Ph. 1a</i> October 1, 2004 – November 30, 2004	\$ 33,257/mo x 2 = \$ 66,514
<i>Ph. 1b</i> December 1, 2004 – November 30, 2005	\$ 33,585/mo x 12= \$ 403,020
<i>Ph. 1b</i> December 1, 2005 – May 31, 2006	\$ 33,585/mo x 6 = \$ 201,510
<i>Ph. 3b</i> June 1, 2006 – November 30, 2006	\$ 51,785/mo x 6 = \$ 310,710
<b>Total</b>	<b>\$ 981,754</b>

Charges to Customers, actual	\$ 981,754
Charges to Customers under phased rates, as ordered	- \$ 981,754
Difference in benefit between Actual and As Ordered:	<b>\$ 0</b>